United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1338

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To be argued by
MICHAEL YOUNG

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ALVIN BURGESS, Appellant.	Docket No. 75-1338

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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ON APPEAL FROM A JUDGMENT
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QUESTION PRESENTED

1. Whether the introduction of evidence concerning appellant Burgess's prior misdemeanor conviction was error requiring reversal.

STATEMENT PURSUANT TO RULE 28 (a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Orrin G. Judd) rendered September 19, 1975, after a jury trial, convicting appellant Alvin Burgess of theft from interstate shipment in violation of 18 U.S.C. §659. Appellant Burgess was sentenced to three years incarceration.

The Federal Defender Services Unit of the Legal Aid Society was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

According to the Government's witnesses, on the morning of November 18, 1974, appellant Burgess, a driver for J. W. Martin Trucking and Delivery Service, Inc., arrived with his truck at the terminal of the Ohio Fast Freight Corporation in Port Newark, New Jersey, to pick up a load of merchandise for delivery in the New York City - Long Island area (13-16, 119-121). As the loading of Burgess's truck was being completed, he observed a shipment of gas burners and burner parts destined for Patchogue, Long Island, being unloaded from a near-by truck (42). Since drivers are paid according to the amount of merchandise they deliver, and the burners were to be delivered in the same vicinity as other merchandise already on his truck, appellant

Burgess requested that he also be permitted to deliver the burners (42). Such requests were not uncommon, particularly when a driver's truck was partially empty (55). The oil burners and parts were thereupon loaded onto the tail end of appellant Burgess's truck and he signed the invoice acknowledging his receipt of them (20). While the goods were being loaded, appellant phoned his supervisor, James Martin, describing to him the shipment he was picking up, including the 4,000 pound load for Patchogue (122-123).

When Burgess returned his truck to the Martin Trucking garage at approximately six o'clock that evening, he turned over to Martin invoices indicating that he had delivered materials in Woodside, Jackson Heights, Flushing and Queens (131). He also turned over invoices for the items still remaining in the truck (124). Martin, observing that there was no invoice for the oil burners, asked Burgess about that shipment. According to both Martin and James Jackson, the company's manager, Burgess responded that he had not picked up the burners from Fast Freight because the shipment had not been ready for loading when he was ready to leave (125, 169).

Later that evening Burgess called Jackson and asked him to tell Martin not to pick Burgess up on his way to work the following day as was Martin's usual practice (171). The following day, Burgess telephoned Martin saying that he was sick and would not be in to work until the following day (126). The following morning, November 20, 1974, when Martin

stopped at Burgess's home to pick him up, he learned that Burgess no longer lived there and had left no forwarding address (128).

A representative of Winkler-Long Island Inc., the designated recipient of the oil burners and parts, testified that the shipment was never delivered to the Patchogue facility (63).

The Government also sought to introduce evidence that appellant Burgess had pleaded guilty to a misdemeanor, possession of a stolen motor vehicle, in New York in 1972. Defense counsel, although stipulating to the fact of this prior conviction, objected repeatedly to its introduction into evidence, both because it was not a prior similar act, and because it was being introduced solely as evidence of appellant's character (69-79, 182-193). The Court admitted the stipulation into evidence over these objections (192).

Appellant Burgess testified in his own defense. He confirmed that he had picked up a load of merchandise at the Fast Freight terminal on November 18, 1974, which included the oil burners and parts in question (209-210). After making several deliveries in eastern Long Island, Burgess proceeded along Farmers Boulevard toward Rockville Center and Patchogue (210-214). While he was stopped for a light at the corner of Farmer's Boulevard and Merrick Road, an individual wearing a navy overcoat and ski mask and wielding a gun entered the cab of the truck, and instructed

Burgess to proceed down Farmer's Boulevard for a distance and then pull over to the side (217-218). There, after waiting in the cab with the masked individual for twenty minutes, Burgess heard someone open the doors to his truck. For the next twenty-five minutes he heard freight being slid around in the truck (220). Then Burgess was instructed to drive to the North Conduit and then to the Aqueduct Raceway (221), where the masked individual took one of Burgess's invoices and got out of the cab, saying to Burgess, "Man, don't tell the police about this because we know as much about you and your family that we know about this shipment right here." (221). Burgess then drove down the road until he came to a restaurant, where he stopped and checked his freight, discovering that the gas burners and parts were missing (221). The invoice for this merchandise was also missing (222).

Burgess then returned to the Martin warehouse, but did not tell Martin or Jackson about the hijacking because he was afraid the hijacker might harm him or his family, or that he himself might be blamed for the theft of the merchandise (227).

Instead, he left, saying he felt ill (226). That night he moved from his residence in Queens to his godmother's apartment (228). Burgess denied having told Jackson or Martin that he had never picked up the burners at Fast Freight (227).

In March, 1975, while appellant was working for the B & C Bus Company, his employer was called before a grand jury by an Assistant United States Attorney attempting to locate Burgess in connection with the disappearance of the burner parts (228, 232). Burgess thereupon called the Assistant United States Attorney's office and then went there, where he was arrested (228-229). At that time he gave a statement which was not as detailed as this testimony at trial (237-245, 280-317).

On rebuttal, the Government called F.B.I. agent Garber, who had taken appellant Burgess's post-arrest statement. Garbar identified the details of appellant's trial testimony which he had failed to include in his post-arrest statement (282-289).

The Government, in its summation, referred to the evidence of petitioner's 1972 misdemeanor conviction as follows:

> Now, ladies and gentlemen, at the very end of the Government's case, do you recall a stipulation was read to you. This was a very short piece of evidence. But I suggest to you that it is one of the most important pieces of evidence that you should consider when you go into the jury room. In 1972, the defendant was convicted on a plea of guilty to criminal possession of stolen property, a stolen motor vehicle. Now, I am not mentioning this crime, ladies and gentlemen, to tell you that because Mr. Burgess committed that crime that means necessarily that he commited the crime that he's being charged with here. I'm not saying that at all. What I am suggesting to you, ladies and gentlemen, is the fact that because Mr. Burgess was convicted of that prior crime it bears very heavily on your consideration when you consider his

> credibility. This should bear on whether Mr. Burgess was the victim of a horrible set of circumstances or whether in fact he is guilty, because we are not dealing here with a man who has never been before in possession of stolen property. He was.
>
> (372)

The Court, in its charge to the jury, gave what it had earlier termed a "misprison of felony" (326) charge:

> . . . It is also the law that anybody who knows of the actual commission of a felony that is punishable in the Courts of the United States and doesn't make the facts known as soon as possible to some judge or other person in authority within the United States is violating the law. Certainly Mr. Burgess is not on trial for such a violation, but you can consider whether his failure to report it was because of fear or ignorance or whether it was because he would have been reporting something of which he was guilty or likely to be suspected of being guilty.
>
> (354-355)

Defense counsel objected to this instruction both before and after it was given (326, 390).

The jury, after deliberations, returned a verdict of guilty on the single count of the indictment.

On September 19, 1975, appellant Burgess was sentenced to three years imprisonment.

ARGUMENT

THE INTRODUCTION OF EVIDENCE CONCERNING APPELLANT BURGESS'S PRIOR MISDEMEANOR CONVICTION WAS ERROR REQUIRING REVERSAL.

The Government's theory of this case was that appellant Burgess stole property from a truck he was driving interstate. Burgess' defense was that the merchandise in question had been stolen from him at gun point.

As part of its direct case, the Government introduced a stipulation which stated:

> . . . defendant Alvin Burgess was convicted on February 25, 1972, on a plea of guilty of criminal possession of a stolen motor vehicle in violation of New York penal law, Section 165.40, as a Class A misdemeanor.
> (192)

Defense counsel, although stipulating to the fact of the prior conviction, repeatedly objected to its introduction into evidence, both on the ground that it was not a prior similar act and because it was being introduced only to impune appellant's character. In summation, the Government relied on this evidence:

> Now, ladies and gentlemen, at the very end of the Government's case, do you recall a stipulation was read to you. This was a very short piece of evidence. But I suggest to you that it is one of the most important pieces of evidence that you should consider when you go into the jury room. In 1972, the defendant was convicted on a plea of guilty to criminal possession of stolen property, a stolen motor vehicle. Now, I am not mentioning this crime, ladies and gentlemen, to

> tell you that because Mr. Burgess committed that crime that means necessarily that he committed the crime that he's being charged with here. I'm not saying that at all. What I am suggesting to you, ladies and gentlemen, is the fact that because Mr. Burgess was convicted of that prior crime it bears very heavily on your consideration when you consider his credibility. (372)

The prosecutor's other use for this evidence, despite his protestations to the contrary, was to impune appellant's character, arguing in effect that he had committed a crime in the past and was by that fact more likely to be guilty of the present charge:

> . . . This should bear on whether Mr. Burgess was the victim of a horrible set of circumstances or whether in fact he is guilty, because we are not dealing here with a man who has never been before in possession of stolen property. He was. (372)

The evidence of this misdemeanor conviction was inadmissible either as a prior similar act or to impeach appellant Burgess' credibility. As to its inadmissibility as a prior similar act, Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

See also Michelson v. United States, 335 U.S. 469, 475 (1948); United States v. Boyd, 142 U.S. 450 (1892). The long-standing rule of this Circuit is to the same effect:

> The rule in this Circuit regarding the introduction of another crime . . . is that such evidence is admissible only if it is substantially relevant to some other purpose than to prove criminal character.
>
> (United States v. Vario, 484 F.2d 1052, 1056 (2d Cir. 1973).

See also United States v. DeCicco, 435 F.2d 478, 483-4 (2d Cir. 1970); United States v. Byrd, 352 F.2d 570, 575 (2d Cir.1965); United States v. Smith, 283 F.2d 760, 763 (2d Cir. 1960); United States v. James, 208 F.2d 124 (2d Cir. 1953); United States v. Modern Reed & Rattan Co., 159 F.2d 656 (2d Cir. 1947). Although Rule 404(b) and the decisions of this Circuit allows the introduction of a prior conviction for certain purposes other than to prove criminal character - i.e., to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident in connection with the charge for which the defendant is on trial - the prosecutor made no attempt to argue to the jury that the 1972 misdemeanor conviction was relevant to any such issues. Nor could he so argue.

The only issue before the jury in this case was whether appellant Burgess had stolen the merchandise in question, or had himself been the victim of a hijacking and theft by another person. The defense made no claim that appellant had converted the goods himself, but by accident, without the requisite knowledge or intent. Moreover, the

Government was well aware, by virtue of appellant's post-arrest statement that he was hijacked, that appellant was precluded from raising such a defense. In cases where no such defense was raised, this Court has repeatedly held that the introduction of a prior conviction as evidence of intent, knowledge, or absence of mistake or accident was error. United States v. DeCicco, supra, 435 F.2d at 483-4; United States v. Byrd, supra, 352 F.2d at 575; United States v. Smith, supra, 283 F.2d at 763; United States v. James, supra, 208 F.2d at 125; compare United States v. Baum, 482 F.2d 1125, 1330-31 (2d Cir. 1973) (where the prior offense was admissible because the defendant claimed lack of knowlege as to the stolen nature of the goods). Moreover, even if knowledge and intent were at issue, the fact that appellant Burgess had previously been convicted of car theft provided no evidence whatsoever that he had the requisite knowledge that the conversion of the merchandise in the present proceeding would be illegal or the requisite intent to so convert.

Similarly, the Government introduced no evidence and made no claim that the 1972 conviction established the motive for the current charge, or that the preparation, plan or modus operandi of that earlier crime was similar to the circumstances surrounding the present crime, and therefore evidence that appellant was the actual thief in this case. Compare United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972); United States v. Kahaner, 317 F.2d 459, 470-72 (2d Cir. 1963).

Rather, the only value of the 1972 conviction as a prior similar act was precisely what the Government argued to the jury - that appellant Burgess was a confessed thief, who had previously stolen, and was therefore likely to have stolen again. The use of a prior conviction to argue such criminal propensity is specifically proscribed by both Rule 404(b) and the decisions of this Circuit.

Nor can the admission of this evidence be justified on the ground that it was probative of appellant's credibility as a witness. Rule 609 of the Federal Rules of Evidence provides as follows:

> Rule 609. Impeachment of Evidence of Conviction of Crime.
>
> (a) General rule. -- For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Appellant's 1972 conviction did not involve dishonesty or a false statement.

The Advisory Committee's Notes on Rule 609 define "dishonesty and false statement" as being limited to crimes "such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any

other offense in the nature of crimen falsi, the commission of which involves some element of deciet, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." Except to the extent that virtually all crimes involve some degree of "dishonesty" in its most general sense, there was no evidence introduced in the present case indicating that appellant's 1972 conviction involved untruthfulness which would be probative of his propensity to testify truthfully. Nor was appellant's 1972 conviction punishable by death or imprisonment in excess of one year. Rather, it was a misdemeanor conviction (New York Penal Law, §165.40) punishable under New York law by incarceration not in excess of one year. (New York Penal Law §70.15). Consequently, it was inadmissible under Rule 609.

Moreover, even if evidence of this conviction had been admissible for impeachment purposes, at the time of its intriduction, it was not presented as probative of appellant's credibility and the jury's consideration of it was not limited to that issue. Rather, it was introduced in the Government's direct case, as a prior similar act probative of guilt, and no instruction limiting its admission to the question of credibility was given. These facts alone render its admission reversible error. United States v. Modern Reed and Rattan Co., supra, 159 F.2d at 658.

In a trial on charges of theft from interstate shipment, the prejudicial impact resulting from the improper introduction of evidence that the defendant had previously pleaded guilty to another theft cannot be ignored. The prosecutor himself focused the jury's attention on this evidence, arguing that it was "one of the most important pieces of evidence that you should consider when you go into the jury room." The Government introduced no eyewitnesses to the theft, no stolen merchandise found in appellant's possession, and no other direct evidence of appellant's guilt. Rather, the jury was required to decide whether to draw an inference of guilt from a case based solely on circumstantial evidence. In this context, the danger that the jury would be inclined to convict appellant because he was a convicted thief, rather than because his guilt of the theft in the present proceeding had been proven beyond a reasonable doubt, was substantial. The improper admission of this evidence requires reversal of appellant's conviction.*

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* The danger that the jury would be inclined to convict appellant Burgess because of his involvement in other crimes not relevant to the present proceeding was also encouraged by the Judge's "misprison of a felony" charge:

> . . . It is also the law that anybody who knows of the actual commission of a felony that is punishable in the Courts of the United States and doesn't make the facts known as soon as possible to some judge or other person in authority within the United States is violating the law. Certainly Mr.

(Continued on next page)

CONCLUSION

FOR THE ABOVE-STATED REASONS, APPELLANT'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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(Footnote continued from page 14). . .

> Burgess is not on trial for such a violation, but you can consider whether his failure to report it was because of fear or ignorance or whether it was because he would have been reporting something of which he was guilty or likely to be suspected of being guilty. (354-355)

Since appellant had testified that he failed to report the theft of the merchandise from his truck, the Court, by this instruction, was in effect advising the jury that appellant had confessed his guilt of a federal felony. Appellant's failure to report the theft of the merchandise was relevant to the present proceeding only in so far as his motive for failing to report the theft might be probative of his guilt or innocence of the crime charged. The Judge's comments on this evidence should have been restricted to a discussion of that issue. The fact that failure to report a felony is a federal crime was totally irrelevant to the present proceeding, and the Judge's instruction to that effect served only to further prejudice the jury against appellant, creating the image that he was an individual who repeatedly engaged in criminal conduct. Defense counsel's repeated objections to this charge should have been sustained.

CERTIFICATE OF SERVICE

11/10, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.